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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 194

FRED A OSSANNA
~~ISAACS, et al~~ 2

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION OF FRED A. OSSANNA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION OF FRED A. OSSANNA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Fred A. Ossanna, an appellant in the above entitled case, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in that case on March 22, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is not reported and is printed at page 1 in a separately bound Appendix submitted jointly by all the defendants. The opinion of the District Court in response to a series of motions made by defendants subsequent to the verdict is not reported and is printed in the Appendix, p. 67.[1]

[1]The Appendix is hereinafter cited as "App. p. ". The review below in accordance with the procedure in the Eighth Circuit, was had on the original papers and the typewritten transcript of the proceedings in the trial court. These consist of seventy-two (72) numbered, typewritten volumes, cited herein as "V. , p. "; together with several unnumbered, typewritten volumes of the pre-trial proceedings identified only by date and so cited herein. The Government exhibits received in evidence are cited by the alphabetic number, viz. "Exh. BZ", those of defendants by the name of defendant and arabic number, viz. "Ossanna Exh. 1", in accordance with their designation at the trial.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1962 (App. p. 1). Timely petitions for rehearing were denied on April 20, 1962 (App. p. 117). The time for filing of a petition for writ of certiorari was extended to and including June 19, 1962, by Order of Associate Justice Byron R. White (App. p. 119). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 and Rule 22(2) of this Court.

QUESTIONS PRESENTED

1. Did the court below err in failing to give effect to the principle enunciated by this Court in *Kotteakos* v. *United States*, 328 U. S. 750 (1946) that prejudicial error results where there is a variance between (a) the indictment which alleges a single over-all conspiracy with multiple objectives and (b) the proof that only supports a series of conspiracies. It is obvious in this case that there is no evidence as a matter of law which can support the existence of a single conspiracy. The objectives of the several conspiracies were independent of each other and the achievement of any of them did not hinge upon the achievement of any other.

2. What effect does the existence of that prejudicial error have upon the conviction of those conspirators who were central to the separate conspiracies that were proven?

3. Did the court below correctly hold that dual instructions given by the trial judge to the jury, one alternative of which had no evidence to support it, was not error and, if regarded as error, was not prejudicial error?

REASONS FOR ALLOWANCE OF THE WRIT

1. The first question turns upon the issue as to whether the court has decided the federal question therein involved in conflict with the applicable decision of this Court in *Kottcakos* v. *United States*, *supra*.

2. The second question, raised only if the first issue is decided in petitioner's favor, and therefor naturally not decided by the court below, posits an important question of federal law which has not been, but should be decided by this Court. Also, the decisions of the Courts of Appeals for the Ninth Circuit and for the Second Circuit are in apparent conflict on the resolution of the problem it presents.

3. The third question involves the sanctioning by the lower court of a departure from the accepted and usual course of judicial proceedings (*Bollenbach* v. *United States*, 326 U. S. 607 (1946)) so as to call for an exercise of this Court's power of supervision.

STATEMENT OF FACTS

In order to ease this Court's burden, this petitioner adopts for the purposes of this petition, the summarization of the involved facts in this case as set forth in the petition for certiorari herewith filed by Fred Isaacs and Harry Isaacs, co-defendants in this case. However, purely for the mechanical convenience of the Court, the petitioner has set forth this summarization in an Annex to this petition. Wherever an argument turns on features of the case related individually to this petitioner, calling for an elaboration of the facts there stated, these will be specifically shown by references to the Appendix or the Record.

Petitioner Ossanna, like the other petitioners, has reserved his rights to raise the issue which it requests this Court to consider. A motion was made in his behalf for

acquittal both at the close of the Government's case in chief on the ground that as a matter of law no single over-all scheme to defraud was sustainable (V. 43, p. 112). Petitioner also moved for a severance and to stand trial with respect to the issues raised severally by the several transactions (V. 43, p. 112). The former motion was renewed at the close of all the proofs and evidence (V. 61, p. 1). Petitioner again excepted to the trial court's submitting the issue of the single over-all scheme to the jury (V. 70, p. 1), and renewed this motion after the verdict (Index Rec. App. No. 125, p. 1692). Petitioner also excepted to the trial court's refusal to grant the requested instruction that fraud was not involved in the procurement of the Minneapolis Conversion Ordinance (V. 70, p. 9).

Petitioner was found guilty on six counts of mail fraud (Counts I, II, III, V, VI and VII), two counts of wire fraud (Counts VIII and IX) and was given a general sentence of four years and a committed fine of One thousand ($1,000) Dollars. He was also found guilty on three counts of interstate shipment of goods allegedly obtained by fraud (Counts XIV, XV and XVI) and on a count of conspirary to commit these offenses (Count XVII). He was given a general sentence of four years to be served concurrently with the prior sentence, together with a committed fine of Ten thousand ($10,000) Dollars. Petitioner was acquitted on one count of mail fraud (Count XII).

BRIEF IN SUPPORT OF PETITION

1. The Applicability of the Kotteakos Doctrine

This Court is not only aware, but has exercised its jurisdiction frequently to make the lower federal courts aware of certain inherent dangers present in the mass trial of defendants on a conspiracy charge. *Grunewald* v. *United States,* 353 U. S. 391, 404 (1957); *Scales* v.

United States, 367 U. S. 203,223 (1961). As all courts have so frequently observed, the partnership in crime, essential to the existence of a conspiracy, is rarely conceived except secretly and proof of that partnership has normally to be inferred from the overt acts. Such acts however criminal they may be when viewed separately, must have a setting in an atmosphere of conception and direction by two or more individuals in order to constitute the crime of conspiracy. *Grunewald v. United States*, *supra*, 402. The records of the common law are replete with instance after instance of the abuse of the charge of conspiracy. It was used to strike down combinations of laboring men endeavoring to exert their collective bargaining power in order to improve their status even until the mid-nineteenth century. *Rex v. Journeymen Tailors of Cambridge*, 8 Mod. 10 (1721); *People v. Melvin*, 2 Wheeler C. C. (N. Y.) 262 (1810); *People v. Fisher*, 14 Wendell (N. Y.) 1 (1835). Its use, particularly when the common law required no proof of an overt act, to maintain in power a ruling clique against an opposing element is historic and marred the essential fairness inherent in our system of law until changes were made in that doctrine, for which this Court has been largely responsible. Indeed, the very charge of conspiracy conjures up in the lay mind the conception of cabals, secret meetings, and designs of a group of persons to subvert the state or the *mores* of a community. It is for this reason that so frequently prosecutors in behalf of the Government tend to include a conspiracy count in an indictment that otherwise merely charges substantive offenses on the part of two or more individuals, despite the absence of some real evidence that the motivating forces behind the individuals had a common interest or purpose.

This is such a case. Taking all the evidence at its worst, it can establish only a series of conspiracies by

officials of a local transit company in combination with various other persons to dispose of surplus property of that company at prices less than their market value. As a normal incident of such conspiracies, the mails, the rails and the telegraph were utilized, just as they must be utilized in practically every ordinary transaction in life. But their use was only incidental to whatever transpired. It was not employment of these means to effect a fraud. The effectuation of the fraud did not necessarily require the use of those very instrumentalities provided or protected by the federal government. Indeed, to take the theory underlying the Government's case, as demonstrated by the first four counts of the indictment, any fraud committed by the officers of any company depriving it of any of its assets makes the statement of the assets on its balance sheet fraudulent, despite the fact that their non-existence could not be discoverable by independent certified public accountants. This then constitutes a federal crime if that balance sheet, in the normal course of events, is sent through the mails. This expansion of federal authority has enormous and powerful implications to the conceptions of federalism which have been the enduring core of this nation for the years of its existence. If a conspiracy to waste the assets of a local transit company was committed by the petitioner and others, the punishment of that conspiracy should obviously be a responsibility of the local government, and not assumed by the federal government simply because the mails, the rails or the telegraph were incidentally employed. It is not enough to say that some stockholders in the company charged to be defrauded were residents of other states. This is true of practically any company whose securities are publicly held. In this local transit situation, the rise or fall of the Transit Company, the scope of its franchises, the rates it could charge, the burdens it had to assume, the records it had to keep, were a responsibility of the State of

Minnesota and not of the Federal Government. *Cf. Parr* v. *United States*, 363 U. S. 370 (1960); *Kann* v. *United States*, 323 U. S. 88 (1944).

This, of course, is not in itself a legal argument. *United States* v. *Young*, 232 U. S. 155 (1914). But it bears directly upon the legal issues involved in this petition for this Court's consideration of the ultimate fairness of the trial accorded to this petitioner. For it is through the incidental use of the mails, the rails and the telegraph that the Government has woven together a series of transactions between officials of the Transit Company and a series of other individuals utterly unrelated as among themselves and charged an over-all scheme and conspiracy to "loot" the Transit Company of property made surplus by its conversion from a street-car to a bus operation.

Eleven co-conspirators were named; others were unnamed. Of these eleven, eight were indicted, of whom seven were tried below together; two were acquitted, and petitioner and four others convicted. All five of those convicted are seeking review by this Court of the judgments entered against them. Of the eight named defendants, petitioner and Larrick (another petitioner) and Towey, whose trial was postponed because of his illness, were officials of the Transit Company. Blumenfield was a character of a very unsavory reputation, particularly in the Twin Cities area. He had been convicted a few months earlier in the very Courtroom in which this case was tried in a sensational case for violating the White Slavery Act.* See

*The Government in its brief in the court below argued that the court could take judicial notice of this fact as well as of the later conviction of Blumenfield together with his two brothers and two associates of a conspiracy to defraud the government and also of the fact that Blumenfield had pleaded guilty to a conspiracy to influence a juror during that trial. (Govt. Brief, p. 10, fn. 5). The argument of the Government as to the relevancy of these matters, despite Blumenfield's acquittal in this case, was that "the

Blumenfield v. *United States*, 284 F. 2d 464 (C. A. 8 1960), *cert. den.*, 365 U. S. 812 (1961). Blumenfield happened to have been a stockholder in the Transit Company and had shown some interest in the affairs of the company. He was acquitted on all counts because of the lack of any evidence relating to the charged conspiracy. The two Isaacs and Jeffords were not employees of the Transit Company but were outsiders as was Landy who was acquitted. The other co-conspirators not named as defendants, namely, Francis, Aune and Carlson, were also outsiders. None of the outsiders, or others named as having participated in transactions charged to have been fraudulent, such as Villaume and Towey, were shown to have had any business transactions with each other or to have known of the transactions that each of them had with the officials of the Transit Company. (The two Isaacs and Landy, as officers and employees of American Iron, of course, knew each other.) There is a possible exception relating to a transaction between Jeffords and Carlson detailed in the Isaacs petition at p. 9, fn. 2. The one bond between the outsiders is that each of them dealt with one or more of the individual Transit Company officials and that each transaction they entered into related to property of that Company made surplus by the conversion to bus operations consisting either of scrap, real estate or securities. The other thing they had in common (although no proof of this fact exists with respect to Towey) is, what all of us have in common, namely, the normal use of the mails, the rails or the telegraph.

Obviously this single nexus of the acquisition of surplus property from those officials of the Transit Company, who had the authority and the responsibility to dispose of that

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underlying influence of Blumenfield pervades every aspect of the conversion fraud" (Id. p. 15). This is but a sample of the mood that characterized this prosecution. See *e.g.*, App. pp. 59-65; 82-86.

property, in a series of transactions, none of which were related to each other.* However fraudulent each one may have been deemed to be, would not of itself as a matter of law support the evidence of a single all-out conspiracy or scheme on the part of the few convicted defendants. Otherwise the doctrines enunciated by this Court in *Kotteakos* v. *United States*, *supra*, and *Ingram* v. *United States*, 360 U. S. 672 (1959) are meaningless. *Blumenthal* v. *United States*, 332 U. S. 539 (1947) is not to the contrary. In distinguishing the facts in that case from those in *Kotteakos* —a distinction equally applicable to *Ingram*—the Court at page 558 said that the salesmen were "aware that these individual sales were part of a large common enterprise, dependent on the carefully evolved arrangements to give the sales a guise of legitimacy, to dispose of a larger share of liquor." The grounds for the distinctive features in *Blumenthal* are carefully set out in the Court's opinion. It said (p. 558) that in that case the "salesmen knew or must have known that others unknown to them were sharing in so large a project", whereas in speaking of the *Kotteakos* case the Court said: "Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise in procuring another's loan. The conspiracies therefore were distinct and disconnected . . ." *Ibid* The situation in the instant case fits that description. None of the "outsiders" was interested in whether any transaction but his would go through; none aided in any way, by agreement or otherwise, in assisting others in effecting a purchase of any surplus property. The successful pursuit of one transaction had no bearing on the successful pursuit of another.

*The possible exception of the Jeffords-Carlson transaction has been noted above.

The prejudice that attaches to the charging of distinct and disconnected conspiracies as a single over-all conspiracy is obvious. It permits "piling inference upon inference", *Direct Sales Co. v. United States*, 319 U. S. 703, 711 (1943); "the burden of defense to a defendant, connected with one or a few of so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate:" *Kotteakos v. United States, supra*, at 766-7; "the dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." *Id.* at 774.

2. The Position of the "Insiders" under the Kotteakos Doctrine.

But if the "outsiders" are deemed to have been prejudiced by being tried for a single conspiracy involving distinct and disconnected transactions, each of which may be a separate conspiracy, the "insiders" such as the petitioner and Larrick, who participated in all or most of the separate conspiracies in that all of them concerned transactions with the Transit Company and the "insiders" were officials of that Company, are equally prejudiced. The burden of their defense is equally increased. With respect to them as well, the danger of the transference of guilt is equally present; the piling of inference on inference is equally possible.

This case illustrates that very fact. The transaction with respect to the Towey lots, detailed in the Isaacs petition at pages 23-24 of the Annex illustrates this exact danger. Admittedly petitioner was in Florida at the time the contract

was made for the sale of these lots between the Company and Towey, posing as "Heintz". The trial judge, who certainly of all the judges who have dealt with this case, had more opportunity to acquaint himself with the facts, charged the jury as follows: "There is no evidence that Ossanna participated in the Towey transaction." (V. 69, p. 105). What the jury determined as to this particular transaction is, of course, unknown. But the court below found that the evidence supported a finding that Ossanna, who was never shown to have had any knowledge that Towey was masquerading as "Heintz", participated in this transactions because "at a meeting of the board of directors of the Company, [he] made the motion whereby the board was persuaded to approve the sale to Towey" (App. p. 34). No such motion was ever made before the board by Ossanna. The motion Ossanna made was one to approve the sale of these lots to Heintz not Towey. (Exh. CX, V. 44, p. 148.) Had Ossanna made the motion the court below said he made, a connection between him and Towey could be inferred, but under the circumstances no such inference is even vaguely possible. If a transference of guilt is so easily made by the learned court below, the possibility of such transferences by the jury, far more serious in character, can easily be surmised.

Towey, Ossanna and Larrick, participated in most of the transactions involved in the conspiracy charged. They may be deemed "central figures" in the sense that Brown was so characterized in the *Kotteakos* case, and what was there deemed to be prejudicial error against the defendants might be argued to be "harmless" as against Brown. But in the *Kotteakos* case no such issue was raised since Brown had pleaded guilty and was not one of the petitioners. To counsel's knowledge the precise question of how to treat the guilt of the central figure has never been determined by this Court in a *Kotteakos* situation. It was before the Court

of Appeals for the Ninth Circuit in *Canella* v. *United States*, 157 F. 2d 470 (C. A. 9, 1946), where the Court upheld the conspiracy conviction with regard to a central figure who had participated in *all* the separate conspiracies. Its brief conclusion that the "central figure" was not prejudiced, despite the admission of a variance between the indictment and the proof, fails to convince. A contrary conclusion was reached by the Court of Appeals for the Second Circuit in *United States* v. *Russano*, 257 F. 2d 712 (C. A. 2, 1958) on slightly different grounds but involving essentially the same principle. There two defendants were convicted of a single conspiracy continuing from 1951 to 1957, but the evidence only established two conspiracies in which both defendants were involved, one in 1952 and the second in 1955-6. Both conspiracies concerned traffic in narcotics. The appellate court reversed the conviction on the basis of the *Kotteakos* case but, since the proof was sufficient to support a conviction for either 1952 or 1955-6, declined to dismiss the indictment; instead remanding the case for a new trial.

Shaffer v. *United States*, 362 U. S. 511 (1960) throws little light on this problem for there the "central figures" again either pleaded guilty or the charges against them were *nolle prossed* at trial and further the conspiracy count was dismissed for lack of proof. However, that case—a five-to-four-decision—raises a serious issue of when joinder of defendants becomes prejudicial.

It can hardly be contended that, after applying *Kotteakos* and reversing as to the outsiders, the judgment should stand as regards the two insiders on the ground that the conspiracy alleged as to them was a single conspiracy. True, the jury can, as it did in this case, find with reference to a conspiracy that certain of the indicted conspirators are not guilty but that the others are. But *Kotteakos* is not based on this principle. Its base lies in prejudice to the defendants; not

on the innocence of those who were found not to have conspired by the jury. The variance between the indictment and the proof still exists and still remains prejudicial to all the conspirators who have been found guilty. The logic of *Kotteakos* is as equally applicable to the insiders as to the outsiders.

3. The Equivocal Instructions to the Jury

Material to the Government's position on the matter of the fraudulent transactions between the Transit Company and American Iron was the passage on October 30, 1953 of the Minneapolis City Ordinance (App. p. 87) which ordinance in return for a consideration paid by the Transit Company permitted that Company to discontinue the operation of its street cars and absolved it of other important obligations, including the repaving of streets from which the rails had been removed. That latter provision obviously benefitted American Iron with respect to its obligations under its contract with the Transit Company (App. p. 101-110) to resurface streets "as required by all City Ordinances . . ." (App. 103, p. para. 3) from which the rails had been removed.

The Government contended that the Transit Company and American Iron from the inception of the original contract of February 11, 1952 and its addenda had no intention of performing them and that the conversion ordinance in relieving American Iron as a third party beneficiary of its obligation to repave was a step in the consummation of the fraudulent scheme so initiated to sell scrap. For the purposes of this petition we accept the finding of the court below that the Government made no charge that the procuring and adoption of the ordinance was accomplished through fraud. The Court specifically found that no such contention had been made as well as the fact that there was

no evidence of "fraudulent conduct on the part of the city officials or representatives of the Company with respect to the adoption of the conversion ordinance" or in its procurement (App. p. 49). However, the trial court in its instructions to the jury told the jury to determine (a) whether the procurement and adoption of the ordinance was "a device arranged by Ossanna and Isaacs to free American from the alleged onerous burden of going forward with the contract," (V. 69, p. 137; App. p. 120) and also (b) whether the parties had ever intended in good faith to go forward with the contracts as evidenced, among other things, by the "relieving of American from its obligations to remove the rails and to repave by the initial Minneapolis City Ordinance" (V. 69, p. 89; App. p. 121). The appellate court recognized that the instruction summarized in (a) above might be "susceptible" to the interpretation that the ordinance was procured through fraud, but held that (1) in "the light of the issue litigated and what actually transpired, we are satisfied that it did not serve to misdirect the jury or *submit an issue that was not supported by evidence* (italics ours)" (App. 50)—despite its finding a moment earlier that it was "crystal clear" that no fraud attended the procurement and adoption of the ordinance (App. 49). Hence it concluded there was no error in the instruction. It went on, however, to say that, assuming there was error, the error could not have been prejudicial since the jury could not have based a verdict on evidence that simply did not exist (App. 50-1).

This is the type of equivocal misdirection of juries that falls within the category of prejudicial error as illustrated by *Bollenbach* v. *United States, supra,* and *Yates* v. *United States,* 354 U. S. 298 (1957). Particularly is this true in a case such as this where not only were the facts extremely complicated, but serious complications attended

the theories upon which guilt was predicated. True, the equivocal instructions related to one fact from which guilt might be inferred, but it is impossible to be certain that the jury was not misled since there was no evidence to support the alternative finding under (a) above. The evidence to support a finding pursuant to the instruction under (b) above, required a rather tortuous conclusion that would make the ordinance, which was shown to be financially beneficial to the Transit Company (Larrick Exh. 27), the capstone of a conspiracy charged to have come into being a year and a half previously—a conspiracy contemplating even then this very action by the City. As the Court observed in *Bollenbach, supra,* at 614, the belief of the appellate court that defendants were guilty and that sufficient evidence thereof could be spelled out of the record, is not the way in which justice is to be had under our system of law. The procedures under which jury findings are made, must first be fair. Only then can a court be satisfied that justice has been done, for it is not the court's belief in the guilt of a defendant that matters, but the fairness of the procedures submitting the issue of guilt to the jury.

This equivocal and unjustified instruction of the trial court casts a shadow of a deep hue on any such sense of satisfaction.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

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ANNEX

STATEMENT*

In 1950, and for many years prior thereto, the Twin City Rapid Transit Company and its subsidiaries (herein called the "Transit Company") operated a street railway system in Minneapolis and St. Paul, Minnesota, and adjacent suburbs (V. 4, p. 103; V. 5, pp. 125-8).

In March, 1951, one Fred A. Ossanna was elected Chairman of the Board of the Transit Company, and in the fall of 1951 its President (V. 28, pp. 70, 75). Under the Ossanna administration the Transit Company converted to bus operation and in March, 1952, employed one Benson M. Larrick to conduct the conversion (V. 6, p. 123).

One Indictment (4-59-Cr. 77) in a series of Counts charged that Ossanna, Larrick and James A. Towey (an officer of the Transit Company not tried because of illness) and Isadore Blumenfield (a stockholder in the Transit Company, later acquitted by the jury) had conspired with petitioner Harry Isaacs and others in a single over all scheme to defraud the Transit Company in the disposition of street railway property which became surplus in the conversion to bus operation and in that connection had made use of the mails and interstate wire communications (V. 69, pp. 5-18).

The Indictment charged that, as "parts" of the single scheme, certain scrap was transferred to petitioner's Company, American Iron and Steel Corporation ("American Iron"), certain real estate and equipment were transferred to petitioner Harry H. Isaacs (which the trial court ruled was not fraudulent, V. 69, p. 95) and various other assets and commissions were transferred or paid to other parties (V. 69, pp. 8-15). A subsequent Count of this Indictment

*This statement is identical with that filed by co-petitioners Fred and Harry Isaacs.

(Count XVII) charged that all the defendants, including Earl Jeffords, a real estate broker, and other co-conspirators not named as defendants, had combined in the same scheme to defraud and to transfer the same assets as "parts" of the scheme (V. 69, p. 20).

The second Indictment (4-60-Cr. 13), consolidated with the first Indictment, charged petitioner Fred Isaacs and Theodore Landy (later acquitted by direction of the Court) with having become a party to the same single conspiracy charged in Count XVII of the first Indictment (V. 69, p. 5).

Certain intermediate Counts in the first Indictment charged Ossanna, Larrick, Towey, and petitioner Harry H. Isaacs with engaging in a scheme to accomplish the interstate shipments of certain scrap acquired by fraud by American Iron from the Transit Company (V. 69, pp. 18-20), which scrap the Government through its answer to a Motion for a Bill of Particulars claimed was the same scrap allegedly acquired in fulfillment of the same scheme to defraud (V. 43, p. 110).

At the trial, there was evidence of fraud in the transfer of scrap by the Transit Company to American Iron, and in the sale of real estate and payment of commissions to others, though none in the sale of real estate and equipment to petitioner Harry H. Isaacs. It also appeared that the scrap transactions were the largest in suit and overlapped the others in time. But there was no evidence that the scrap transactions depended on the conceiving or consummation of the other objectives for their success, or were connected in any way with the others, though all the transactions related to the disposition of surplus property and an officer or officers of the Transit Company necessarily participated in all.

The evidence, summarized in terms most favorable to the Government's contentions, can be stated as follows:

The Scrap Transactions: The Transit Company employed American Iron to remove track, trolley wire and other overhead appurtenances in exchange for the salvage removed, first under an exchange of letters between Ossanna and petitioner Harry H. Isaacs in July and August, 1951 (Ossanna Exhs. 2, 4, 5, V. 7, pp. 29, 31-4), and then under a formal written contract of February 11, 1952 (Exh. BZ, App. p. 101) and two Addenda thereto (App. pp. 106, 109). The letter agreement required American Iron to "repave wherever necessary" and the formal contract obligated it to "resurface * * * as required by all City Ordinances" of Minneapolis, as the Transit Company was obligated to do under its franchise (V. 6, p. 97; V. 21, pp. 43-4). In practice, American Iron was not required to repave at any time after the formal contract was executed; it had been required to do so on one street in 1951 (V. 20, p. 36; V. 50, pp. 115-16), but there was evidence that the Transit Company had borne the cost of that repaving (Exhs. I-M, I-N, V. 9, pp. 38-9). On October 30, 1953, the City of Minneapolis adopted an ordinance, accepted by the Transit Company on November 27, 1953, under which the Transit Company (and hence American Iron) was relieved of its franchise obligations to perform such removals and repaving, in consideration of $922,700.00 in cash payable over a ten-year period and the removal of so-called "special work" in paved intersections up to a cost of $300,000.00 (App. p. 87). American Iron did not contribute to the Transit Company's cost in cash or services and, so far as appears, was not asked to do so.

The potential cost of removing the rails and repaving in paved streets in Minneapolis substantially exceeded the salvage value of the track and overhead, possibly by as much as $1,000,000.00 (V. 7, p. 136; V. 21, pp. 100, 112; V. 26, p. 43; H. Isaacs Exh. 113, rec'd. V. 59, p. 25). The second

addendum to the removal contract, however, dated January 2, 1953, extended to American Iron in terms the right of "removal of underground cables" (App. p. 110), a provision which could reasonably be construed as extending to all such cables in the Transit Company system (V. 69, pp. 87-8), then of an estimated value of $1,000,000.00, less an estimated cost of removal of $50,000.00 (Exh. AG-2, V. 6, pp. 39-40). In practice, the cables were removed by the Transit Company's own forces and delivered to American Iron (V. 14, pp. 44-5; V. 15, p. 1). Petitioner Fred Isaacs reported to the Transit Company only some 20% of the weight actually received (Exh. JT, rec'd. V. 23, p. 121; Exh. K-1, rec'd. V. 22, p. 122; Exh. JX-4, rec'd. V. 24, p. 118), and American Iron paid for the weight so reported at prices substantially below the market value (V. 25, pp. 105-10), but in a total amount exceeding the estimated cost of removal of all the cable (H. Isaacs Exh. 114, V. 56, pp. 153-7, 179-80). If the second addendum were construed as giving American Iron the right to retain the cables for the service of removing them, as American Iron construed it (App. p. 16), but the Transit Company pulled them for its own purposes, instead of permitting American Iron to do so, American Iron was required to reimburse the Transit Company for the cost of removal, as the trial court agreed (V. 60, p. 106).

The removal contract of February 11, 1952 gave American Iron first option to purchase other, miscellaneous scrap at "ceiling price"; such prices were in effect from January, 1951 through February, 1953 under federal regulations (App. p. 105; V. 46, p. 56). In prior practice, the Transit Company had cleaned, sorted and prepared such scrap to the various specifications of steel mills and refineries, recorded it in inventory, and sold it on competitive bids at the Transit Company's own weights (V. 8, pp. 18-19,

141-2). The Transit Company delivered such scrap to American Iron without preparation, inventorying, or competitive bidding, and at American Iron's own weights and prices (V. 8, pp. 79, 89-91; V. 26, p. 77). Much of such scrap contained debris and some was worthless (V. 16, pp. 78, 105; V. 18, pp. 125-137). Petitioner Fred Isaacs furnished the Transit Company weight slips reporting 5% to 75% less that the gross weights of the scrap received (H. Isaacs Exhs. 111, 112, rec'd V. 56, pp. 20, 26; V. 16, pp. 25-30). These were forwarded to Larrick, in charge of the Transit Company's scrap program (V. 4, pp. 137-9), and he, in turn, sent American Iron the monthly totals for pricing and remittance (V. 22, pp. 132-140).

The Midcontinent Transaction: On December 22, 1953 the Transit Company contracted to sell petitioner Harry Isaacs, doing business as Midcontinent Construction and Development Company, certain real estate and machinery and equipment for $300,000.00, $100,000.00 in cash and $200,000.00 payable in one year (V. 31, pp. 46-50). All but one of the properties were certified by a qualified engineering firm approved by the Trustees for the company's bondholders, as having a value not in excess of the sale price (V. 32, pp. 105-18). On December 22, 1953, Harry Isaacs entered into a partnership agreement with one Robert Levitt, giving Levitt 52½% of the profits from development and sale of the properties so acquired, in exchange for his guaranteeing payment of the $200,000.00 (Exh. LZ, V. 31, pp. 57, 64-5). Levitt, in turn, took as subpartners his clients, the defendant Blumenfield and four business associates (V. 31, pp. 67-8), though this was not then known to Isaacs or Ossanna (V. 69, pp. 94-5).

The trial court ruled that the Midcontinent transaction was not fraudulent as a matter of law, and dismissed two related mail fraud counts, but permitted it to be considered

on the relationship of the parties (V. 61, p. 72; V. 69, p. 95).

Other transactions: There was evidence of fraud in other transactions tried in the same proceeding. Neither petitioner participated in any of them, or even knew any other defendant or alleged co-conspirator, except the Transit Company officers with whom they dealt in the scrap transactions.

(a) *Mexican Notes:* In 1955, the Transit Company discounted eight notes (V. 27, pp. 119, 170-1), acquired in part payment for streetcars sold in September, 1953 to a transit agency in Mexico City and guaranteed by Nacional Financiera, S.A., an agency of the Mexican Government (Exh. CP-2, V. 28, pp. 29, 33-5). From a total of $728,256.00 received, the Transit Company paid commissions of $238,349.73 to one George A. Francis, who was ostensibly engaged in the export-import business in Mexico City and named as a co-conspirator but not as a defendant (V. 30, pp. 109-10; Exh. BE-26, rec'd. V. 30, p. 88). Francis did not buy the notes (V. 27, pp. 119, 170-1; V. 29, pp. 39-40), and there was evidence that the then going rate of commission for brokerage services was ¼% to 1% of the face amount of the notes, or less than $10,000.00 (V. 30, p. 29). One payment to Francis was deposited in a Miami, Florida, bank, from which Francis withdrew $53,000.00 in cash (Exh. LP; V. 30, pp. 39, 45).

(b) *Hopkins right-of-way:* On May 6, 1955, on recommendation of Ossanna, the right-of-way formerly used for service to the Village of Hopkins, valued between $84,500 and $150,000 (V. 34, pp. 40-1, 133-40), and for two years unsuccessfully offered for highway purposes (V. 35, pp. 3-24), was sold for $10,000.00 to one W. N. Carlson, named as co-conspirator but not as a defendant (Exh. DD, V. 55, p. 107). Carlson shortly thereafter entered into an agreement with Ossanna's son and daughter to share, as he

claimed, the profits and losses fifty-fifty (V. 55, pp. 87-9). Carlson sold the real estate for $125,050 over a three year period (V. 36, pp. 64-66) and paid $52,000 to Ossanna Olson and daughter (V. 36, pp. 54-7; Exh. ND-1 rec'd. V. 36, p. 31). They in turn paid $30,000.00 to Ossanna personally and to an Ossanna family corporation, to repay an indebtedness to them. Ossanna claimed (V. 51, pp. 147-8, 158-9, 165).[2]

(c) *Jeffords Commission:* During the period July 6, 1954 through February 16, 1955, the Transit Company paid defendant Jeffords, doing business as J & C Holding Company, a total of $107,500.00 as purported commissions on the sale of three properties (V. 36, pp. 85-6; V. 37, p. 55; V. 38, pp. 114-15). There was evidence that Jeffords did not procure the purchases and had no valid listings (V. 36, pp. 72-83; V. 37, pp. 24-8, 136, 181-4; V. 38, pp. 107-15, 176). Jeffords withdrew substantial sums in cash as received (V. 39, pp. 83-6, 100, 102) and claimed that he lost $65,000.00 gambling in Florida (V. 38, pp. 53, 54).

(d) *The Towey Lots:* On March 1, 1954 Towey purchased two lots from the Transit Company in his uncle's name for $500.00 and resold them for $5,500.00 while masquerading as his uncle (V. 33, pp. 91-3, 172-3, 178-9).[3]

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[2] On May 23, 1955 Jeffords and his partner, one Marvin Benjamin, acquired an option from Carlson to purchase 800 feet which were in fact located on the Hopkins right-of-way, which agreement was on November 25, 1955 modified so as to release to Carlson 650 feet in consideration of $8,000.00 (Exh. XC-1, V. 35, pp. 55-7; Exh. NE-1, V. 35, pp. 57, 61). In July, 1955, Jeffords and his partner sold 150 feet for $12,000 (V. 35, pp. 64-5), with the result that, on all the transactions, they made a net profit of $14,000.00.

[3] On January 17, 1955, the Transit Company paid one Paul Villaume a reasonable $37,500.00 commission for services in procuring the sale of certain real estate (V. 37, pp. 190-1). Villaume thereupon made a donation of $7,500.00 to the Ossanna Foundation (V. 37, p. 193). The Government's theory, as stated by the Court below was that as a part of the scheme to defraud the Transit Company paid in the form of a commission $7,500.00 more than it was obligated to pay Villaume (App. p. 31).

Such, basically, was the evidence, viewed most favorably to the Government. Although no question is presented as to the sufficiency of the evidence of fraud in the scrap transactions, or any transaction in suit, separately considered, a further statement is required for a consideration of the second of the two questions presented on this petition, involving the Minneapolis Conversion Ordinance.

The Minneapolis Conversion Ordinance: The trial court permitted the jury to find fraud in the procurement and enactment of the Minneapolis Conversion Ordinance, of which the court below specifically found there was no evidence. That court however affirmed the convictions of petitioners on another theory, for which there was evidence.

The removal contracts, as the trial court instructed, required American Iron to perform or to be ready, willing and able to perform, all of its contract obligations, including the most onerous one, that of repaving in Minneapolis, as a condition of obtaining track and overhead or underground cable in exchange for the service of removal (V. 69, pp. 87-8). The Indictment charged that American Iron was fraudulently relieved of its contract repaving obligations as a "part" of the scheme to defraud (V. 69, p. 11), and this became a major issue at the trial (see, e.g. V. 20, pp. 16-120; V. 21, pp. 8-114, 180-99; V. 49, pp. 190-200; V. 50, pp. 3-123; V. 69, pp. 39-40, 88-9).

In particulars given in advance of trial, the Government claimed that the fraud occurred at the time, and because, of the enactment of the Minneapolis Conversion Ordinance of October 30, 1953 and its acceptance by the Transit Company, which action relieved American Iron, without any consideration, of its obligations to repave. This claim was stated by the Government as follows:

> "Mr. Janes: * * * the Transit Companies had, of course, the obligation to resurface. It was the Tran-

sit Companies' obligation to the City. After there had been some removal of rail and some lesser repaving, the Transit Companies acquired a release from the City of its entire obligation for a substantial consideration, and in so doing, at the Transit Companies' expense, achieved the release of American Iron and Supply Company's obligation to do some repaving, and released the Transit Companies' obligation in the future, and anybody else's that might arise, by contract or otherwise, throughout the City.

"The Court: Do you mean that the Transit Companies, for a consideration paid to the City, were released of their obligation to resurface certain stre , and American, in its contract with Transit, had agreed, as a part of the consideration for the salvage, to resurface those streets, and consequently, your position is that American received that benefit that enured to the Transit Companies without paying any consideration therefore?

"Mr. Janes: That is right."

* * *

"The Court: The remaining streets that had to be resurfaced by American, American was relieved therefrom by reason of Transit paying a consideration to the City of Minneapolis to be relieved of its initial [franchise] obligation, and therefore, a benefit was bestowed on American that it was not entitled to in view of its contract with Transit, and Transit illegally or unlawfully gave it a benefit to which it was not entitled?

"Mr. Janes: Right." (Transcript of Proceedings of October 16, 1959, pp. 133-5).

Alternatively, the Government on the same occasion claimed that the fraud may have occurred *before* the enactment of the ordinance, as follows:

> "Mr. Janes: * * * I would like to add to that, that we have evidence that American Iron had been relieved by the Transit Company of its paving obligations *prior* to the transaction with the City, between the Transit Company and the City relieving it of the obligation". (Id. p. 130; italics supplied.)

At the trial, the Government stated its first claim as follows:

> "The Court: The enactment of this ordinance to the extent that American * * * was (not) obliged to repave didn't enure to the benefit of American * * *. That was a perfectly okay transaction between the streetcar company and the City of Minneapolis relieving the Transit Company of repaving these streets, is that right?"
>
> "Mr. Janes: That is right.
>
> "The Court: Then your contention is that to the extent that American was obliged to repave and to the extent it was relieved of its obligation to repave, then the release obtained from the Transit Company was an incident here that you contend had some fraudulent aspects?
>
> "Mr. Hyam Segell: Yes, sir, third party beneficiary." (V. 21, pp. 186-7).

In stating its alternative claim at the trial, the Government asserted that the parties had "abandoned" the removal contracts (V. 49, p. 203), and added that the removal contracts were only a "paper matter placed in the files, rather than a contract between two parties at arm['s] length intending to carry it out" (V. 42, p. 130), and were drawn in that form "to hide what was going on" (V. 43, p. 25).

The minutes of the proceedings leading to the enactment of the conversion ordinance (V. 50, pp. 125-147;

V. 51, pp. 80-136) made it "crystal clear," as the court below concluded, that there was "no fraud", on the part of the representatives of the company in the "actual procurement or adoption of the ordinance" (App. p. 49).[4] There was uncontradicted evidence, moreover, that the Transit Company was released by the ordinance, not only of its obligation to repave the "surfaces" (which American Iron had assumed) but of its additional obligations to repave tie beds in poor condition and to clean and remove snow from streets along its routes (which American Iron had not assumed), with a resulting financial benefit to the Transit Company substantially in excess of the cost which it incurred under the ordinance (V. 21, pp. 45, 51, 55; Larrick Exh. 27, rec'd. V. 48, p. 44).

In charging the jury, however, the trial court failed and refused to give an instruction requested by petitioners that

> "There is no evidence that the passage of the Minneapolis Conversion Ordinance in October 1953 was

[4]Faced with this evidence, the Government conceded in final rebuttal argument at the trial that the "conversion ordinance wasn't a part of any scheme" to defraud (V. 68, p. 65). The trial court nevertheless submitted to the jury the question of whether there was fraud in procuring the enactment of the ordinance, as hereafter set forth, and in the court below the Government claimed that its concession was in error and that there was in fact "fraud in the procurement of that ordinance." (Transcript of Oral Arguments of counsel, p. 128). The Government referred (id. pp. 128-30) to a letter from Harry Isaacs to Ossanna of July 28, 1953, which requested renegotiation of the removal contracts because of alleged excessive costs (Exh. HI-1 V. 9, pp. 55-7) and to the authority granted to Ossanna by the Transit Company on August 21, 1953, to renegotiate the contracts (V. 9, pp. 52-5), and claimed that, while there was no evidence that the contracts were ever renegotiated, there was evidence that American Iron's operations had in fact been profitable and that Ossanna's motive in negotiating the enactment of the conversion ordinance was to relieve American Iron of its repaying obligations. As stated, however, the court below concluded that there was no fraud in the actual procurement or adoption of the ordinance.

> procured with the design of relieving American of its obligations to repave any of the streets in Minneapolis, or as a part of any scheme to defraud the Transit Company." (App. p. 46).

Instead, the court charged the jury that it was "the Government's position" that defendants schemed to relieve American Iron of its paving obligation "by the passage of the Ordinance" (App. p. 120), and instructed the jury to determine whether there was fraud in the passage of the Ordinance, as follows:

> "*What about the ordinance passed by the City of Minneapolis* to relieve the streetcar company of its duty to remove tracks and repave and the other obligations which the streetcar company had under its franchise? *Was that a device arranged by Ossanna and Isaacs to free American from the alleged onerous burden of going forward with the contract*, Government's Exhibit BZ?" (App. pp. 121-2, italics added).

The court separately submitted to the jury the alternative claim of the "Government" that "the parties never intended in good faith to go forward with the contracts according to their terms regarding the demolition of the system" (App. p. 121) as evidence by, among other things, "relieving of American of its obligation to remove the rails and to repave by the Minneapolis City Ordinance * * *" (App. p. 121).

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JUN 18 1962
JOHN F. DAVIS, CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~1047~~ 187

FRED ISAACS and HARRY ISAACS

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

No. ~~1048~~ 188

BENSON M. LARRICK

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

No. ~~1054~~ 194

FRED A. OSSANNA

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

No. ~~1049~~ 189

EARL A. JEFFORDS

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

JOINT APPENDIX

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Hayward-Court Brief Ptg. Co., Mpls. 15, Minn.

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APPENDIX

Opinion of the Court Below

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 16,655

Fred Isaacs, Appellant,
vs.
United States of America, Appellee.

No. 16,656

Harry H. Isaacs, Appellant,
vs.
United States of America, Appellee.

No. 16,662

Fred A. Ossanna, Appellant,
vs.
United States of America, Appellee.

Appeals from the United States District Court for the District of Minnesota.

No. 16,663

Benson M. Larrick, Appellant,
vs.
United States of America, Appellee.

No. 16,669

Earl A. Jeffords, Appellant,
vs.
United States of America, Appellee.

[March 22, 1962.]

Before JOHNSEN, Chief Judge, and VAN OOSTERHOUT and MATHES, Circuit Judges.

MATHES, Circuit Judge.

Appellants Fred A. Ossanna, Benson M. Larrick and Harry H. Isaacs were found guilty by a jury of mail and wire fraud violations, transporting property fraudulently obtained in interstate commerce and of a conspiracy to commit offenses against the United States; appellants Fred Isaacs and Earl A. Jeffords were found guilty of a conspiracy. The trial took place in the United States District Court, District of Minnesota, Fourth Division, with the Honorable Gunnar H. Nordbye presiding. Judgments of convictions were entered on the jury's verdicts. Separate appeals have been taken but all appeals will be disposed of in one opinion.

Preliminarily, a brief resume of the background and the factual situation forming the genesis of the prosecution will be of assistance to a clearer understanding of the issues presented on appeal.

The Twin City Rapid Transit Company was the parent company of the following subsidiaries: Minneapolis Street Railway Company, the St. Paul City Railway Company, the Minneapolis and St. Paul Suburban Railroad Company, Twin City Motor Bus Company, the Minnetonka and White Bear Navigation Company, the Rapid Transit Real Estate Corporation, and the Transit Supply Company.[1]

The parent company was established in 1891, its stocks

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[1] The parties in the numerous briefs have generally referred to the parent company and its subsidiaries as either TCRT or Transit Companies. Since all are regarded for the purpose of these cases as one company, we shall, in the interest of brevity, unless otherwise designated, refer to the parent company and its subsidiaries as the Company.

and securities have been listed on the New York Stock Exchange since 1895, and its approximately 450,000 shares of common stock are held by approximately 3,000 shareholders situated throughout the United States and Canada.

Prior to January 1, 1950, the Company operated an electric street railway system over approximately 430 miles of street railway lines in the Twin City area of Minneapolis and St. Paul, Minnesota, and the suburbs thereof. The Company generated and distributed the electricity necessary in the operation of the system. It owned power plants where electricity was generated, electrically operated streetcars, an overhead system of cables, trolley wires and poles, the track system of steel rails, streetcar barns, real estate, and an underground transmission system, consisting of copper wires encased in lead cables laid in tunnels which generally followed street patterns throughout the Twin City area.

Before 1949 the Company's management was under the presidency of D. J. Strouse. One Charles Green, a substantial shareholder in the Company, was elected president of the Company in November, 1949. Fred A. Ossanna, one of the appellants herein, was then appointed general counsel of the Company.

Green's [illegible]ation as president was short-lived. Apparently because of procedures he employed strife developed among members of the board of directors, with Ossanna becoming the head of one faction and Green leading the other faction. Ossanna organized a stockholders' committee and conducted a proxy campaign which brought about the ouster of Green. He was replaced by Emil B. Aslesen, who served from March, 1951, to September, 1951, when Ossanna became president.

The Ossanna administration embarked upon a program of rapid conversion from streetcars to busses. This program caused a vast amount of property previously utilized in the operation of the street railway system to become surplus, and these prosecutions are based upon the procedures employed in the disposition of the surplus property or in connection with such disposition.

A brief statement of the occupation of the parties and their relationship, if any, to the Company should be made before other aspects of the trial proceedings are considered.

Fred A. Ossanna has been a lawyer since 1921 and prior to becoming associated with the Company, practiced his profession in Minnesota; at the time he organized the stockholders' committee in 1951, Ossanna was the direct and beneficial owner of 200 shares of the preferred stock and 11,500 shares of the common stock of the Company. He was president of the Company during the period of the alleged violations.

James H. Towey became a member of the board of directors with the advent of the Ossanna administration, and was secretary and treasurer of the Company during the period of the alleged violations. For a brief period of time he was in charge of the scrap program. He was a member of the Ossanna stockholders' committee organized for the proxy campaign and owned 170 shares of preferred and 5,700 shares of the common stock of the Company.

Benson M. Larrick with prior experience in the maintenance and operation of busses, was employed by the Company in 1952 and was placed in charge of the scrap resulting from the conversion. Larrick was made a director in 1954 and remained with the Company until 1957.

During this period he was general manager, vice-president and assistant to the president.

Isadore Blumenfield, although not a member of the stockholders' committee referred to, was the real owner of a substantial number of shares of stock of the Company. He was a friend and close business associate of Ossanna.

Harry H. Isaacs was president of American Iron & Supply Company (American Iron), which acquired the greater portion of the overhead and underground scrap and salvage from the Company, and is also a partner in American Salvage & Supply Company. (Other partners were Fred Isaacs and Theodore Landy). Harry Isaacs was also a partner in Mid-Continent Development and Construction Company which also acquired certain real estate and scrap from the Company. (There were five other partners including Isadore Blumenfield and his attorney, Robert Levitt).

Earl A. Jeffords was a realtor doing business as J & C Holding Company. He was the owner of 500 shares of the common stock of the Company at the time the stockholders' committee was organized and functioned, and was a member of that committee.

Fred Isaacs, the son of Harry H. Isaacs, was secretary of American Iron and partner in the American Salvage & Supply Company; he actively participated in the acquisition of the overhead and underground surplus scrap acquired from the Company.

In this setting we proceed to consideration of the indictments upon which appellants were tried, and other formal proceedings in the trial court.

The indictments are lengthy, but may be summarized as follows: Indictment No. 4-59-CR. 77, returned September

18, 1959, was in 17 counts, and named as defendants the appellants Ossanna, Larrick, Harry Isaacs, and Jeffords, and also James H. Towey and Isadore Blumenfield.[2] Within this indictment, four separate statutory offenses were charged, to wit: use of mails to execute a scheme to defraud (18 U.S.C.A. § 1341);[3] use of wire communication in furtherance of a scheme to defraud (18 U.S.C.A. § 1343);[4] transportation in interstate commerce of goods knowingly converted or taken by fraud (18 U.S.C.A. § 2314);[5] and conspiracy to commit an offense against the United States (18 U.S.C.A. § 371).[6] As may be seen, each of these offenses depends directly (or in the case of § 371, perhaps indirectly) upon the presence of a scheme to defraud. In Count I of this indictment, the scheme was described in detail—there it was alleged that all of the named defendants (save Jeffords) were participants in "a scheme and artifice to defraud (the Transit Company) and the

2 The date of docketing appeals of the respective appellants governs and accounts for the order in which appellants' names appear in the records of this Court.

3 "Whoever, having devised or intending to devise any scheme or artifice to defraud, * * *for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter * * *to be sent or delivered by the Post Office Department, * * *shall be fined * * *."

4 "Whoever, having devised, or intending to devise any scheme or artifice to defraud, * * *transmits or causes to be transmitted by means of wire, radio or television communication in interstate * * * commerce, any writings, * * * for the purpose of executing such scheme or artifice, shall be fined * * *."

5 "Whoever transports in interstate * * * commerce any goods, * * * of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud, * * *shall be fined not more than $10,000, or imprisoned not more than ten years, or both."

6 "If two or more persons conspire to commit any offense against the United States, * * *and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 * * *."

stockholders . . . of real and personal property, and for obtaining for themselves and others not entitled thereto money and properties by means of false and fraudulent pretenses, representations, and promises.". For the purpose of later discussion, it is important to bear in mind that this *"overall scheme"* is the keynote and common thread running throughout the separate counts, and it is this scheme —"to loot the Transit Companies"—that serves to bind appellants together in guilt. After recital of the fraudulent scheme generally, as quoted above, Count I of the indictment then proceeded to recite some 17 transactions alleged to be "a part of said scheme and artifice." For the sake of brevity, these transactions have been characterized in trial and in the briefs under five headings: 1) fraud in dispositions of scrap and salvage; 2) fraud in sale of Mexican notes; 3) fraud in sale of the Hopkins Right-of-Way; 4) fraud as to commissions paid to defendant Jeffords; and 5) fraudulent transactions involving sale of lots to defendant Towey. It is important to note at this point that all of these transactions involved dispositions of Company assets.

This preliminary recital of the "overall scheme" and parts thereof, was realleged in each of the subsequent mail fraud and fraud by wire counts. Counts I through XIII were based upon the "mail fraud," or "wire fraud" statutes, each alleging mail or wire communications upon separate stated dates. Counts I through III covered the sending of incomplete and misleading annual reports on Company affairs (concealing transactions as to surplus salvage and scrap), and the defendants Ossanna, Larrick and Harry Isaacs were found guilty on these charges; Counts V and VI covered letters involving disposition of scrap and salvage, and defendants Ossanna, Larrick and Harry Isaacs were found guilty on these counts. Counts VII, VIII

and IX were directed to communications concerning the Mexican notes, and defendants Ossanna and Larrick were found guilty, and defendant Harry Isaacs, *not guilty* on these three counts. Counts XIV, XV and XVI also directed to transactions with scrap lead and cable, charged violations of 18 U.S.C.A. § 2314 (interstate transportation of fraudulently obtained property) through transportation on three separate dates of scrap and cable from Minnesota to points in Illinois and Nebraska, but it was not alleged these shipments were made as part of the overall scheme. The jury found defendants Ossanna, Larrick and Harry Isaacs guilty on these three counts.

Count XVII was the conspiracy count, whereby it was charged that the defendants Ossanna, Towey, Larrick, Blumenfield, Harry Isaacs and Jeffords, conspired together, and with one George A. Francis, one James B. Aune, and one Walter N. Carlson (not named as defendants), and others unknown, to commit offenses against the United States (18 U.S.C.A. § 371)—to wit: violations of the wire fraud, mail fraud, and interstate transportation of property statutes, as condemned in the preceding counts. A total of 39 overt acts were alleged which, generally speaking, covered the various transactions alleged in the substantive counts. The jury found defendants Ossanna, Larrick, Harry Isaacs and Jeffords guilty as charged under this count.

The defendant Towey, named as a defendant under the foregoing 17 counts, was not tried with the other defendants due to illness. The trial court directed a judgment of acquittal as to defendant Blumenfield on Counts XIV, XV and XVI (transportation of scrap), and the jury found defendant Blumenfield not guilty on all of the remaining counts tried. The jury also found defendants Ossanna,

Larrick and Harry Isaacs not guilty as to Count XII, which involved commissions paid to a certain Paul Villaume.[7]

The appellant Fred Isaacs is before us by reason of his conviction under a second indictment, being No. 4-60-CR. 13. There, Fred Isaacs, and one Theodore Landy were named as defendants, charged with violation of the conspiracy section (18 U.S.C.A. § 371). Generally speaking, this indictment was identical with Count XVII of Indictment No. 77, with some additional overt acts alleged, particularly with regard to alteration of weight tickets. The trial court directed a judgment of acquittal as to the defendant Landy, and the jury found defendant Fred Isaacs guilty as charged.[8]

After meticulous consideration by the trial court of every contention and claim of error asserted, appellants' after trial motions for judgments of acquittal, or in the alternative, for new trials, were denied. Ossanna was given a general sentence of four years, and a committed fine of $1,000 on his convictions under Counts I, II, III, V, VI, VII, VIII and IX, and an additional four years, to be served concurrently, and a committed fine of $10,000, covering his convictions on Counts XIV, XV, XVI and XVII. Harry Isaacs was given a general sentence of four years and a committed fine of $1,000 on his convictions under Counts I, II, III, V and VI, and an additional general sentence of four years, to be served concurrently, and a committed fine of $10,000 upon his convictions under Counts XIV, XV, XVI and XVII. Appellant Larrick was

7 The trial court dismissed Counts IV, X, XI and XIII of Indictment No. 4-59-CR. 77 prior to submission to the jury.

8 A third indictment, being No. 4-59-CR. 78, was dismissed by the court pursuant to motions of defendants.